

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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MARCOS GARCIA.

Plaintiff,

V.

NANCY A BERRYHILL

Defendant.

Case No. 2:16-cv-01018-APG-NJK

ORDER ACCEPTING REPORT AND RECOMMENDATION AND REMANDING

(ECF Nos. 18, 21, 26)

10 Magistrate Judge Koppe issued a report and recommendation (ECF No. 26)
11 recommending I remand to the administrative law judge (“ALJ”) to resolve a conflict between the
12 residual functional capacity (“RFC”), which precluded plaintiff Marcos Garcia from interaction
13 with the public, and the vocational expert’s conclusion that Garcia could perform the job of a
14 cleaner, which the Dictionary of Occupational Titles (“DOT”) states includes the duties of
15 rendering personal assistance to patrons.

16 The defendant objects, arguing that the DOT description and the RFC are not in conflict
17 because the DOT indicates interacting with other people is not a significant aspect to the cleaner
18 position. Alternatively, the defendant argues that even if there is a conflict, the ALJ's failure to
19 address it was harmless because the job requires only limited public interaction, and the
20 vocational expert testified that a hypothetical person with Garcia's RFC could perform the cleaner
21 job as generally performed. Finally, the defendant argues that Garcia failed to raise before the
22 ALJ the issue of a conflict between the RFC and the DOT, so that issue has been waived.

23 I conducted a de novo review under 28 U.S.C. § 636(b)(1). I agree with Magistrate Judge
24 Koppe that remand is appropriate for the ALJ to inquire into the conflict between the RFC's
25 limitation of no public interaction with the DOT's description of the cleaner position. The ALJ
26 will have to resolve whether the RFC's limitation (which appears to preclude any contact with the
27 public) is consistent with a job that has some, albeit insignificant, public interaction.

1 Even if Garcia waived the issue by not asking the vocational expert about the asserted
2 inconsistency, I have discretion to review an issue not raised before the ALJ to avoid manifest
3 injustice so long as the defendant is not prejudiced. *See Meanel v. Apfel*, 172 F.3d 1111, 1115
4 (9th Cir. 1999); *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996). The defendant would not be
5 prejudiced by my consideration of the issue because I remand to the ALJ to address it. The
6 defendant can argue to the ALJ that there is no discrepancy between the RFC and the DOT.
7 Failure to resolve the apparent discrepancy may result in the unjustified denial of benefits. I
8 therefore adopt Magistrate Judge Koppe's report and recommendation and remand to the ALJ to
9 address the asserted inconsistency.

10 IT IS THEREFORE ORDERED that defendant Nancy Berryhill's objections (**ECF No.**
11 **27) are overruled** and the report and recommendation (**ECF No. 26) is adopted.**

12 IT IS FURTHER ORDERED that plaintiff Marcos Garcia's motion to reverse or remand
13 (**ECF No. 18) is GRANTED.**

14 IT IS FURTHER ORDERED that defendant Nancy Berryhill's cross-motion to affirm
15 (**ECF No. 21) is DENIED.**

16 IT IS FURTHER ORDERED this matter is **REMANDED** to the Administrative Law
17 Judge for further proceedings consistent with this order.

18 DATED this 10th day of May, 2017.

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20 
ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

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